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## **MEMORANDUM OF POINTS AND AUTHORITIES**

I.

## **DISCUSSION**

4 Pursuant to this Court's Order entered on June 16, 1999, Ground 4 of the instant Petition was  
5 dismissed at DAVIS' request. Ground 1 of the instant Petition was also dismissed at DAVIS' request  
6 pursuant to this Court's Order entered on August 2, 1999. The August 2, 1999 Order also found that  
7 Grounds 2(b), 2(c), and 2(d), were procedurally barred. That Order gave DAVIS the opportunity to file  
8 a supplemental pleading and the opportunity to overcome the procedural bar with a showing of cause  
9 and prejudice. On or about August 6, 1999, DAVIS filed a Motion Conceding to the Dismissal of  
10 Ground 2 (b-d). In his Supplemental Points and Authorities (Supplement), however, DAVIS now states  
11 that he does not wish to voluntarily dismiss Ground 2 (d). DAVIS' Supplement then purports to make a  
12 showing of cause and prejudice and further alleges that that the procedural bar should be excused on the  
13 basis of a miscarriage of justice. For the following reasons, Respondents oppose DAVIS' request.

**A. DAVIS HAS FAILED TO MEET HIS BURDEN TO SHOW CAUSE TO EXCUSE THE PROCEDURAL DEFAULT.**

16       Ground 2(d) of the instant Petition alleges that DAVIS' attorney was ineffective because he  
17       failed to challenge the adult court's jurisdiction on the robbery charge. DAVIS argues that he tried to  
18       raise Ground 2(d) in the state courts but was frustrated in that effort by his attorney. According to  
19       DAVIS, he sent a supplement to his petition to his attorney requesting that this claim be presented to  
20       the court. It therefore appears that DAVIS is alleging the his attorney's ineffectiveness caused the  
21       procedural default because he failed to raise the claim.

To demonstrate cause for a procedural default, the prisoner must be able to "show that some **objective** factor external to the defense impeded" his efforts to comply with the state procedural rule. Murray v. Carrier, 477 U.S. 478, at 488 (1986) (emphasis added). For cause to exist, the external impediment must have actually prevented a petitioner from raising the claim. McCleskey v. Zant, 499 U.S. 467, 497 (1991). In establishing prejudice from a procedural default, a habeas petitioner bears:

... the burden of showing not merely that the errors [complained of] constituted a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire [proceeding] with errors of constitutional dimension.

1 White v. Lewis, 874 F.2d 599, 603 (9th Cir. 1989) (citing United States v. Brady, 456 U.S. 152, 170  
 2 (1982) (emphasis in original)). If a petitioner fails to show cause, however, the court need not consider  
 3 whether he suffered actual prejudice. Engle v. Isaac, 456 U.S. 107, 134 n. 43 (1982); Roberts v. Arave,  
 4 847 F.2d 528, 530 (9th Cir. 1988).

5 Ineffective assistance of counsel will satisfy the cause requirement for a procedural default.  
 6 Carrier, 477 U.S. at 488.

7 Attorney error short of ineffective assistance of counsel does not  
 8 constitute cause for a procedural default even when the default occurs on  
 9 appeal rather than at trial. To the contrary, cause for a procedural default  
on appeal ordinarily requires a showing of some external impediment  
preventing counsel from constructing or raising a claim.

10 Id., at 492 (emphasis added). As McCleskey instructs, counsel's ineffectiveness, which constitutes the  
 11 external impediment, must have prevented the petitioner from raising the claim that was ultimately  
 12 defaulted. 499 U.S. at 497.

13 In considering DAVIS' Second State Petition, the Nevada Supreme Court determined that the  
 14 petition was successive and his claims were procedurally defaulted because DAVIS could have raised  
 15 the claims in his first post-conviction proceeding. See Respondents' Motion to Dismiss, at Exhibit Q.  
 16 Accordingly, the only conduct by counsel that could be considered as ineffective in terms of cause for a  
 17 procedural default, would be counsel's failure to raise the defaulted claims in DAVIS' first post-  
 18 conviction proceeding. However, the constitutional right to counsel is limited to trial counsel and  
 19 counsel on first appeal. Pennsylvania v. Finley, 481 U.S. 551, 555 (1987). In addition, there is no right  
 20 to counsel in a collateral proceeding even when counsel is appointed by the court. Poland v. Stewart,  
 21 151 F.3d 1014, 1022 (9<sup>th</sup> Cir. 1998). Having no constitutional right to counsel in his post-conviction  
 22 proceeding, there can be no cause from ineffective counsel. Ortiz v. Stewart, 149 F.3d 923, 932 (9<sup>th</sup>  
 23 Cir. 1998).

24 Moreover, DAVIS alleges that he tried to raise Ground 2(d) in the state courts and supports this  
 25 claim by pointing to a supplement to his petition that he asked his attorney to raise. DAVIS attaches a  
 26 copy of that document to his Supplement at Exhibit B (beginning at p. 28). That document, however,  
 27 does not include the same claim as Ground 2(d). Ground 2(d) is an ineffective assistance of counsel  
 28 claim. None of the allegations in the state supplemental petition requested by DAVIS of his attorney

1 included any ineffective assistance claims. Under McCleskey, counsel's ineffectiveness must have  
 2 prevented the petitioner from raising the claim that was ultimately defaulted. 499 U.S. at 497.  
 3 Accordingly, DAVIS cannot show cause to excuse the procedural default on Ground 2(d). Failing to  
 4 show cause, the Court need not reach prejudice. See Carrier, 477 U.S. at 497.

5 **B. DAVIS CANNOT PREVAIL ON A MISCARRIAGE OF JUSTICE CLAIM**  
 6 **BECAUSE HE HAS FAILED TO SHOW THAT HE IS ACTUALLY INNOCENT**  
**OF THE CRIME**

7 Finally, DAVIS argues that even if the cause and prejudice requirement are not met, a  
 8 fundamental miscarriage of justice will result if the defaulted claims are not considered by this Court on  
 9 the merits. This exception to the procedural bar doctrine, however, is reserved for the "extraordinary  
 10 case, where a constitutional violation has probably resulted in the conviction of one who is actually  
 11 innocent. . . ." Carrier, 477 U.S. at 496. The meaning of "actual innocence" is factual innocence of the  
 12 offense, not legal innocence. Bousley v. United States, 523 U.S. 614, \_\_\_, 118 S. Ct. 1604, 1611  
 13 (1998). Schlup v. Delo, 513 U.S. 298 (1995), sets forth a two part test that a petitioner must meet in  
 14 order to prevail on a "gateway" claim of actual innocence. First, the petitioner must "support his  
 15 allegations of constitutional error with new reliable evidence -- whether it be exculpatory scientific  
 16 evidence, trustworthy eyewitness accounts, or critical physical evidence -- that was not presented at  
 17 trial." Id. at 324. Next, the petitioner must prove, "that it is more likely than not that no reasonable  
 18 juror would have convicted him in the light of the new evidence." Id. at 327.

19 In the instant action, DAVIS does not contend that he did not commit the murder. Instead, he  
 20 claims that the gun accidentally discharged and he did not have the requisite intent for first degree murder.  
 21 This is a claim of legal innocence and cannot constitute a basis for excusing his abuse of the writ. See  
 22 e.g., Deere v. Calderon, 890 F. Supp. 893, 904 (C.D. Cal. 1995) ("insanity defense is the opposite of actual  
 23 innocence; it concedes the act, but interposes a bar to legal responsibility."). Thus, DAVIS is unable to  
 24 demonstrate a fundamental miscarriage of justice to excuse his abuse of the writ.

25 **II.**

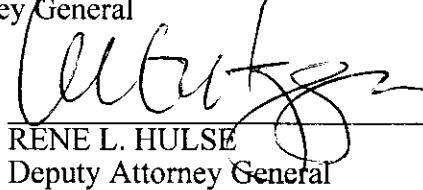
26 **CONCLUSION**

27 This Court has already dismissed Grounds 1 and 4 of the instant Petition. DAVIS now asks this  
 28 Court to dismiss Grounds 2(b) and 2(c). In addition, Ground 2(d) is procedurally barred from review in  
 29

1 this Court, and DAVIS has failed to meet his burden to show cause and prejudice or a fundamental  
2 miscarriage of justice to excuse the procedural bar. Accordingly, Ground 2(d) should also be dismissed.

3 DATED this 7<sup>th</sup> day of September, 1999.

4  
5 FRANKIE SUE DEL PAPA  
6 Attorney General

7 By:   
8 RENE L. HULSE  
9 Deputy Attorney General

10 **CERTIFICATE OF SERVICE**

11 I hereby certify that I am an employee of the Office of the Attorney General of the State of Nevada  
12 and that on the 7<sup>th</sup> day of September, 1999, I served the foregoing OPPOSITION TO PETITIONER'S  
13 SUPPLEMENTAL POINTS AND AUTHORITIES by mailing a copy thereof addressed to:

14  
15 JIMMIE DAVIS, NDOP #27362  
16 NEVADA STATE PRISON  
17 P.O. BOX 607  
18 CARSON CITY, NEVADA 89702

19   
20 An employee of the Nevada  
21 Attorney General's Office